Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 74-1537

OCTOBER TERM, 1974

M.W. ZACK METAL COMPANY,
Petitioner,

v.

INTERNATIONAL NAVIGATION CORPORATION OF MONROVIA,
Respondent.

WRIT FOR SUMMARY REVERSAL OR FOR CERTIORARI TO UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES
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M.W. ZACK METAL COMPANY,
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v.

INTERNATIONAL NAVIGATION CORPORATION
OF MONROVIA,
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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

The Petition of M.W. Zack Metal Company seeking a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, affirming the dismissal of petitioner's complaint or for a summary reversal of the same, respectfully shows:

OPINIONS BELOW

The decision of the Court of Appeals modifying its decision of affirmance upon motion for re-hearing, but again affirming the order of dismissal of the complaint by the District Court is reported at 510 F. (2) 451. See appendix "A". The first decision of the same Court of Appeals affirming the order of the District Court is not officially reported: but is appendix "B". The decision of the District Court dismissing the complaint is not officially reported; it is appendix "C". The Petition for re-hearing en

banc or by the panel, is appendix "D". It is not printed but it is filed separately as an original part of the record.

JURISDICTION

The judgment of the Court of Appeals was entered on March 10, 1975, after a timely motion for a re-hearing was filed from its decision of January 16, 1975 affirming the District Court's order of dismissal of the complaint. This court has jurisdiction under 28 U.S.C.A. 1254(1).

QUESTIONS PRESENTED

Petitioner having filed in the District Court its complaint in admiralty alleging a traditional cause of action for cargo damage to its cargo of steel coils, and that a German court had adjudged the defendant liable for such damage, and on motion to quash the service of process in Admiralty, the district court dismissed the complaint, and on appeal, the Court of Appeals affirmed, but only on the ground (not decided by the District Court) that the German judgment was an in rem judgment and it could not support a claim against defendant in personam, and, almost simultaneously with said decision of affirmance, the German Court of Appeals had dismissed the suit against defendant because of a time-bar provision as stated in the German Civil Code and petitioner timely sought a re-hearing in the Court of Appeals below to vacate its order of affirmance as moot and to permit the cause of action for cargo damage to proceed:

1. Whether the Court of Appeals erroneously violated any Constitutional rights of the petitioner, when it failed to acknowledge that the issue before it was no longer whether this suit was to enforce a German Court judgment when the

dismissal of the suit against defendant in Germany was communicated to it, while it still had jurisdiction over the suit, but was one based upon the original cause of action for cargo damage.

2. Whether the refusal of the courts below to acknowledge that our Admiralty Courts have jurisdiction to enforce a judgment of a foreign court in a case normally of Admiralty and Maritime jurisdiction, should occasion this court's use of its powers to settle that issue in favor of jurisdiction.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, Cl. 1: The Judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority;— to all cases affecting Ambassadors, other Ministers and Consuls—to all cases of admiralty and maritime jurisidction; * * * to Controversies * * *—between citizens of different States;—* * *.

Article IV, Section 2, Cl. 1: The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States.

Amendment V to the Constitution: No person shall be deprived of life, liberty, or property, without due process of law * * *.

United States Code Provisions

28 U.S.C.A. 1333: Admiralty, Maritime and Prize cases. The district courts shall have original jurisdiction exclusive of the courts of the states of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to all suitors in all cases all other remedies to which they are otherwise entitled * * *.

28 U.S.C.A. 1254: Court of Appeal: certiorari; appeal; certified questions;

Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree; * * *.

28 U.S.C.A. 1291: The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * *.

28 U.S.C.A. 2106: Determination. The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order or require such further proceedings to be had as may be just under the circumstances.

The Following Rules of the Supplemental Rules For Certain Admiralty and Maritime Claims:

Rule B. Attachment and Garnishment: Special Provisions

(1) When available; Complaint, Affidavit, and Process. With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees named in the complaint to the amount sued for, if the defendant shall not be found within the district. Such a complaint shall be

accompanied by an affidavit signed by the plaintiff or his attorney that, to the affiant's knowledge, or to the best of his information and belief, the defendant cannot be found within the district. When a verified complaint is supported by such an affidavit the clerk shall forthwith issue a summons and process of attachment and garnishment. * * *

(3) Answer. * * *

(b) By Defendant. The defendant shall serve his answer within 30 days after process has been executed, whether by attachment of property or service on the garnishee.

Rule C. Actions in Rem: Special Provisions. * * * (b) * * * Except as otherwise provided by law a party who may proceed in rem may also, or in the alternative, proceed in personam against any person who may be liable.

Rule E. * * * 2; Complaint; Security.

(a) Complaint. In actions to which this rule is applicable the complaint should state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading.

Federal Rules of Civil Procedure

Rule 8. General Rules of Pleading. * * *

(e) Pleadings to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise and direct. No technical forms of pleadings or motions are required. * * *

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

Rule 12. Defenses and Objections—* * *

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. * * * If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

* * * *

(g) Consolidation of Defenses in Motion. * * *

If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

Rule 15. Amended and Supplemental Pleadings.

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, * * *

(c) Relation back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. * * *.

Rule 56. Summary Judgment.

* * *

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. * * * The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

* * *

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

* * *

STATEMENT OF THE CASE

In January 1960, plaintiff caused a cargo of 93 coils of steel to be placed on board defendant's vessel, Severn River, to be transported from Antwerp, the port of loading, to New York, its destination, under a clean bill of lading signed by the master. Upon arrival the steel coils were discharged heavily damaged in transit. Plaintiff duly filed libels in Admiralty against the issuers of the bill of lading, Contam Linie, and the ship, in the district courts of New Jersey and of the Eastern and Southern Districts of New York preparing to seize the vessel and obtain jurisdiction in Admiralty. Before expiration of time to sue, as extended, a suit was commenced by German counsel retained by plaintiff against the Contam Linie and its partners and the vessel owner, International, in the German Court in Hamburg in May 1961. It became known at this time that Contam Linie were the charterers of the carrying vessel. The first judgment was rendered therein in 1966 but against the charterers only, decision respecting the owner's liability being deferred. In June and December 1971, decisions were made by the same court holding defendant liable as owner of the vessel but limiting the collection of the judgment to an execution upon the Severn River which the court said was then sailing the seas. In truth, plaintiff learned afterwards, that the Severn River was totally wrecked several years before the judgment. All parties took appeals from said judgments. The charterers provided security and plaintiff agreed to stay execution against them. The owner did not file any security pending its appeal and plaintiff never agreed to stay execution against it but sought to enforce the judgment.

When in 1972 another vessel of the defendant, the Virtus, was scheduled to arrive at Norfolk, Virginia,

plaintiff caused this suit to be filed in the district court at Norfolk in admiralty making the usual allegation that the suit was an admiralty and maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure, intending thereby to invoke the admiralty jurisdiction of the district court and becoming entitled to all of the remedies available to a suitor in our Admiralty courts, the most important being obtaining security by the attachment of the vessel.

The complaint alleged the aforesaid facts of a cargo damage claim, viz; the shipment at Antwerp in good order and condition for delivery to New York under a bill of lading signed by the master, and delivery at destination in damaged condition. Also the German judgment was alleged as awarding plaintiff a sum of approximately $150,000.

Meantime, defendant by notice returnable April 17, 1972 moved to quash service of the summons and process of attachment. This motion was not decided but a stay of all proceedings was directed for six months pending decision of the German Appeal Court. On February 9, 1973, at plaintiff's request to the court either that it extend the six month period without prejudice to plaintiff or direct defendant to file its answer, the district court entered an order directing plaintiff to file a brief discussing the finality and scope of the judgment and the jurisdiction of the admiralty court to proceed. Such a brief was filed June 7, 1973, and the court set the matter down for argument for October 19, 1973. On October 15, 1973 defendant served an alleged amended motion returnable October 19, 1973, adding to its motion to quash and to vacate the attachment, a request to dismiss the complaint. Plaintiff immediately filed objection to such a motion, filed ad-

ditional opposition papers but requested additional time or a hearing at which proof of the proceedings had in the trial court in Germany could be adduced to prove the validity of plaintiff's contention that the judgment was an in personam judgment against the defendant.

The district court by decision dated March 4, 1974 dismissed the complaint, on various grounds, one of which was that admiralty did not have jurisdiction to enforce a judgment of a court of a foreign nation even if it decided a case of maritime jurisdiction because the cause of action would be merged within the judgment and an action on a judgment is an action on a debt enforcible only on the civil side.

The Court of Appeals ignoring the reasons of the district court for dismissal, affirmed on the sole ground that it found the German judgment to be an in rem judgment and not an in personam judgment against the defendant. It also stated that plaintiff could not declare upon the original cargo claim because that was outlawed under Cogsa and that a substantial question was raised about the enforceability of the foreign judgment in Admiralty. The Court of Appeals decision is dated January 16, 1975. On January 9, 1975, the German court of appeals had dismissed the suit there as against this defendnat by applying the German Commercial Code which it said had outlawed the action as against this defendant. Thus the question of whether the German trial court's judgment was in personam or in rem was rendered moot. Whether plaintiff could proceed on the balance of its complaint became the issue. As the dismissal of its suit in Germany was not on the merits—res judicata could not apply. Petitioner timely moved the Court of Appeals for a rehearing, en banc or by the panel, to vacate its decision of January 16, 1975, as contrary to law for it decided the fact

of whether the judgment to be enforced was an in rem or an in personam judgment despite the proof by plaintiff that it was an in personam judgment. Also petitioner advised the Court of Appeals of the dismissal of the action against the owner making the question decided by the court below moot. Plaintiff requested that it be permitted to proceed on the original cause of action for cargo damage. Also plaintiff requested that the court eliminate from its decision the finding that such a cause of action was outlawed because the fact was that the running of the time-bar had been tolled in 1961 when four libels were timely filed, and that its declaration of a doubt whether our Admiralty court had jurisdiction should also be stricken. The Court of Appeals, by its decision of March 10, 1975, modified its decision of January 16, 1975 by omitting the references to the time-bar and to the possible lack of Admiralty jurisdiction, but affirmed again, restating that plaintiff had declared on the judgment that that judgment was an in rem judgment and could not support an action in personam. It paved the way for plaintiff to commence another action on the original cargo damage claim by expressly stating that it had not passed upon the merits of such a claim. By its silence, it refused to recognize that it had decided an issue which was moot or that petitioner was entitled to proceed on the cargo damage suit or to amend or supplement its complaint.

It is plain from the foregoing statement of the case, that petitioner was deprived of its Constitutional right to the remedies available in our Admiralty courts when it sought to invoke that jurisdiction to vindicate its claim for damage to its cargo of steel and also that the Court below exceeded its jurisdiction in deciding an issue that was moot.

REASONS FOR GRANTING SUMMARY REVERSAL

Upon the face of the decision of the Court of Appeals under review, that decision plainly decides the issue of fact as to whether the judgment of the German trial court is an in rem or in personam judgment against this defendant despite the petitioner's report to that court that the German appeal court had reversed the judgment which reversal rendered the issue decided entirely moot. Not only was the decision a determination of a moot question but also it was a determination of a fact issue rather than a holding that a fact issue was found. Hence, the court exceeded its jurisdiction as defined in Article 111, Section 2, Clause 1 of our Constitution; and it contravened and violated the due process clause and the equal protection of citizens under the laws clause of our Constitution.

The allegations of the complaint and even the allegations of the petitioner in its affidavits opposing the motion must be taken as true. They recite a meritorious cause of action. The complaint is attached as Appendix E, see also p. A3-A5 of Appendix below. It alleges the delivery of a cargo of steel to defendant's vessel in good order and condition at Antwerp and the re elivery of the same at New York in damaged condition. The carriage was performed under a bill of lading of Contam Linie but signed by the master of the vessel, the Severn River. Under the bill of lading, Contam Linie acknowledged that the goods were received on board the Severn River. Hence, both Contam Linie and the vessel owner are carriers and their duties with relation to the goods are defined under Cogsa. In the suit in Germany, the trial court held both charterer and owner liable. The damages demanded were $79,000. The trial court had allowed a lesser amount. On the appeal that followed the German court of appeals dismissed the suit as

against the owner and further reduced the recovery against the charterer. The dismissal was a time-bar spelled out from the operation of the German Commercial Code. Hence, the dismissal is not on the merits and that judgment is not res judicata to a suit on the original cause of action against the owner; see p. 10 of Petition for re-hearing, appendix D, citing Warner v. Buffalo Dry Dock Co., (2 C.A., 1933) 67 F. (2) 540; and Vol 1, Restatement, 2nd, Conflict of Laws, Sec. 110. See also, Bournais v. Atlantic Maritime Co. Ltd., 220 F. (2) 152.

The German appeal court reduced the recovery against the charterer by applying the $500. per package limitation of Cogsa to its liability as the charterer. The amount allowed is $33,000. Yet, there were 93 coils in the whole shipment and two carriers, and the total damage was over $79,000. Interest dates from 1960. That court also said that the owner was liable for ship-board damage but it did not say how much of the total was shipboard damage. As it is, petitioner, even if paid by the charterer, will not have a full recovery and it has a valid claim against this defendant in admiralty for the difference. Several questions of the construction of the provisions of Cogsa that have never before been decided are involved.

Consequently, the merits of petitioner's cause against this defendant as owner of the Severn River have not been determined against petitioner.

The owner is liable in personam, separately and in addition to the charterer, for the damage to petitioner's steel because the bill of lading was signed by the "master"; see *Gans S.S. Lines v. Wilhelmsen*, 275 F. 254 at 262; *The Roanoke*, 189 U.S. 185, 195; *Field v. So. Atlantic S.S. Lines*, 201 Fed. 301, 305; and *The Alert*, 61 Fed. 113. See also *Gilmore & Black, The Law of Admiralty*, 2nd ed., pp.

209 and 217. At the same time the carrying vessel, was subject to a maritime lien.

This suit was in personam against the owner. The complaint states the elements of the original cargo damage claim and the fact of the judgment in favor of petitioner in the German trial court. Now that that judgment has been reversed, the complaint still alleges the elements of the original cargo damage suit. Consequently, determining that the judgment of the trial court was an in rem judgment so as to dismiss the action, the Court of Appeals exceeded its jurisdiction in refusing petitioner's application for permission to proceed on its original cause of action. The court of appeals closed the doors of the admiralty court to this suit. Both actions are violative of rights which are guaranteed to petitioner by the Constitution. Depriving petitioner of the right to proceed with this suit will require it to pay a bill of costs of several thousand dollars, the loss of its security, and the expense of re-starting a new suit against this same defendant, which was difficult enough in 1961 so as to compel petitioner to proceed in Germany where jurisdiction was finally had. Why isn't this suit sufficient to bring the matter to trial?

Furthermore, the decision of the court of appeals conflicts with decisions of this court, with the established procedures in Admiralty, and with the Rules 8(e) and 15 of the Federal Rules of Civil Procedure respecting the sufficiency of pleadings and the allowances of amendments and supplemental allegations of fact occurring after the commencement of the action.

Furthermore, it sanctioned and condoned an irregular proceeding resulting in a decision on the merits against petitioner, dismissing its complaint without a trial, without proper notice and sufficient specifications of grounds for

the dismissal found by the courts below, and even without defendant ever filing its pleading. All this is in contravention to Rules 12 and 56 recited above.

Defendant had started out to quash the service of admiralty process but it never pressed that ground. It abandoned it and both courts accepted the fact that the service was good and that there was proper in personam jurisdiction as provided by Rule B of the Supplemental Rules for Certain Admiralty and Maritime Causes. See page A48 of the Appendix for a copy of defendant's notice. The reasons stated in defendant's motion for quashing the service related to the merits of the action rather than to the sufficiency of the service of the process used. See *The Resolute*, 168 U.S. 437 where this court said at p. 439 that when the jurisdiction of a cause in admiralty is attacked, the sole question is whether admiralty has the parties before it and whether the cause is one cognizable as a case of admiralty and maritime jurisdiction. All other questions belong to the merits. See also *The Maggie Hammond v. Morland*, 76 U.S. (9 Wall) 435, 457.

The court had only the complaint, and an informal translation of one part of a three part German judgment and defendant's notice of motion to quash, before it. Proof of service of the process had been filed by the Marshal showing service of process upon the captain of the vessel and at the same time showing the arrest of the vessel. Arguments of the motion were had on its return date of April 17, 1972, the transcription of which appears at p. A51 et seq. of the same appendix. As stated the hearing ended with the parties' stipulation above mentioned.

On January 19, 1973 plaintiff's counsel wrote the district judge respectfully requesting a trial date or otherwise proceeding with the litigation. See p. A114, A115. No

answer or renewal of its motion had as yet been served by defendant though six months had passed. On February 9, 1973 the district judge directed plaintiff to file a brief on the issue of whether the judgment is final and binding, and of the jurisdiction of the court to proceed. See A116. On June 7, 1973 plaintiff served and filed the brief requested, and, an affidavit by Dr. A. Drobnig, plaintiff's counsel at Hamburg stating that no stay pending appeal was arranged by defendant and the judgment was thus enforceable. See A117-A129 for the brief. Dr. Drobnig's affidavit is an addendum to respondent's brief and is reproduced here as Appendix F. The court set the matter down for oral argument for October 19, 1973. Defendant then served an amended motion to quash on October 15, 1973 adding a request for the dismissal of the action on various grounds stated but in conclusory form with no supporting affidavit and no proof of the validity of the claims for dismissal save an affidavit by Dr. Herbert Gienow its German counsel who discusses German law and answers Dr. Drobnig's affidavit. See A137 et seq. for the motion and A133 et seq. for Dr. Gienow's affidavit, which is Appendix G. New York counsel for petitioner also filed an affidavit objecting to a consideration on the merits and requesting time to gather and submit proof of its claims.

These were all the papers before the court. Yet, a decision on the merits was made. None of the grounds for dismissal stated by the district court were adopted by the Court of Appeals and the only ground for dismissal adopted by the Court of Appeals was that the judgment of the trial court in Germany could not be enforced in admiralty because it did not make defendant liable in personam. This was a determination of an issue in dispute. Dr. Drobnig's affidavit and Dr. Gienow's affidavits both referred to the judgment as one against the defendant to

suffer an execution upon the carrying vessel. The last paragraph of Dr. Drobnig's affidavit states that in German law the defendant will be held liable. The judgment itself (A29 et seq) convicts the defendant not the vessel. It also states that the defendant is International Navigation, not the ship. The judgment states that the vessel was sailing the seas assuming its existence as a vessel in operation. Also it fails to show that the court had jurisdiction over the vessel a prerequisite to a judgment in rem. Petitioner plainly pleaded these facts in support of its claim that the German court could not validly render a decree in rem as it had no jurisdiction in rem and that, fraud had been perpetrated by defendant upon the court by concealing the fact that the vessel had been destroyed several years before the judgment; see A145, A147, A155, A156, A601-2. At least, an issue for trial should have been recognized.

This court clearly distinguished the difference between liability for a wrong and the damages flowing from such liability in *Sartor v. Arkansas National Gas Corp.*, 321 U.S. 620. The court of appeals did not make this distinction but it seems to have confused the liability of the ship owner to be liable for the wrong complained of with his liability to have his ship subjected to execution, which is a remedy available under German law. The German law would have corrected its decree had it known that the Severn River was not sailing the seas but had been wrecked and totally lost several years before. At least, petitioner should have been permitted to go to trial on the true meaning of this judgment. In *Sartor*, this court said at page 268, "It may well be that the weight of the evidence might be found on trial to be with defendant. But it may not withdraw these witnesses from cross-examination, the best method yet devised for testing the trustworthiness of testimony."

In *Poller v. Columbia Broadcasting Systems Inc.*, 368 U.S. 464, this court said at p. 467; "The end of each one (suits) of them, if courts remain true to their ancient traditions of justice, is to try each case in a way that permits truth to triumph." This quote is repeated by Mr. Justice Black at page 306 of *First National Bank of Arizona, etc. v. Cities Service Co.*, 391 U.S. 253. Also the litany of the deficiencies existing in that case as to why summary judgment should not have been granted, apply with greater force here, because here there are sound reasons for saying that the failure to follow the Rules of Practice did not afford but actually deprived the petitioner of a fair opportunity to be heard. Also, whether defendant was personally held liable and whether the limitation of execution upon the Severn River was a correctible error, were issues which could not be decided on the state of the Record as it stood before the Court of Appeals. Besides in *Hilton v. Guyot*, 159 U.S. 113, this court said that local remedies are not binding upon our court in proceedings to enforce a foreign judgment and that what is enforceable about a foreign judgment is its conclusion of liability.

Also, 6 Moore's Federal Practice on summary judgment says at p. 2020 that where it appears that a trial would be best to arrive at the truth of the contentions, the motion should be denied. Moore's cites this court's decision in *Kennedy v. Silas Mason Co.*, 334 U.S. 249, where at p. 257 this court remanded the case to the district court to reconsider and amplify the record because "We consider it the part of good judicial Administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or a comprehensive statement of agreed facts."

Here the failure of the facts to support the court's

determination unequivocally is plain. Yet, petitioner had no notice that a decision was sought such as was given. Nor was that decision one that naturally follows as a matter of law from such facts as were before it, and, anyway petitioner's request for time and an opportunity to present facts to establish that the judgment was a personal judgment by introducing the transcript of the court records and witnesses should have been heeded. This is provided by subdivision (f) of Rule 56 of the Federal Rules of Civil Procedure. Moore's says at p. 2300 that where there is no dispute about the facts but there are about the inferences that are to be drawn from them the motion should be denied.

Leaving the foregoing errors aside, a violation of the Constitutional provisions occurred in the failure of the Court of Appeals to recognize that the question it decided was moot while the matter was sub judice. This court said in *Duke Power Co. v. Greenwood County*, 299 U.S. 259 at 267: "Where it appears upon appeal that the controversy has become entirely moot, it is the duty of the Appellate Court to set aside the decree below and to remand the cause with directions to dismiss. * * * (Cases cited). If it appears that supervening facts require a retrial in the light of a changed situation, the appropriate action of the Appellate Court is to vacate the decree which has been entered and revest the court below with jurisdiction of the cause to the end that issues may be properly framed and the retrial had. See * * *" cases cited. This court vacated all decrees and remanded the case with directions that the parties be permitted to amend their pleadings in the light of the existing facts, and the cause be tried upon the issues presented.

This court refused to consider the issues presented in *SEC v. Medical Committee for Human Rights*, 404 U.S.

403 for mootness, saying at p. 407 that:

> "It is well settled that federal courts may act only in the context of a justiciable case or controversy." *Benton v. Maryland,* 395 U.S. 784, 788 (1969) 'Our lack of jurisdiction to review moot cases derives from the requirement of Article 111 of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.' *Liner v. Jafco Inc.,* 375 U.S. 301, 306 n. 3 (1964); c/f *Doremus v. Board of Education,* 342 U.S. 429, 434 (1952)."

It is respectfully suggested that the Court of Appeal's action is inconsistent with these and many other decisions of this court holding that it, an appellate court, has no jurisdiction over an issue no longer in controversy between the parties. Mr. Justice Holmes said in *Barker Co. v. Painter's Union,* 281 U.S. 462, "But a court does all that its duty compels when it confines itself to the controversy before it." It was said in *United States v. International Mine etc.,* 190 F. (2) 865 "* * * settled principles of our jurisprudence forbid United States Courts to decide abstract questions." Then the court cited many cases holding that courts do not have the power to decide moot questions.

Going beyond its duty under these circumstances is going beyo ' its jurisdiction. In this case, the Court of Appeals sho have recognized the change in the judgment unde nsideration and not make a decision as though it stil s in existence. Chief-Justice Hughes said in *Patterson v. Alabama,* 294 U.S. 600 at p. 607, that this court "in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to any change, whether in fact or in law,

which has supervened since the judgment was entered." The court of appeals invoked an old rule of election of remedies to justify its decided views of dismissal. Not only was that old doctrine not applicable here because the choice of saying that the action was to enforce the judgment in a maritime case for cargo damage and of saying that this was a cargo damage cause are not mutually exclusive, but that doctrine is no longer an applicable doctrine unless just reason exists to apply it; see, *Louis Cook Plumbing & Heating, Inc., v. Frank Briscoe Co.,* (10 C.A., 1971), 445 F. (2) 1177; *Mike Bradford & Co. v. F.A. Chastain Const. Inc.,* (5 C.A. 1968), 387 (2) 942, and *Ore S.S. Co. v. A/S Hassel* (2 C. A. 1943), 137 F. (2) 326.

Furthermore, in Admirality, pleadings are exceedingly simple and free from technical requirements; see *Archawski v. Hanoiti,* 350 U.S. 532, 534, citing *Dupont v. Vance,* 19 How. 162, 171-172; *The Adeline,* 9 Cranch 244, 3 L.ed. 719, *The Gazelle,* 128 U.S. 474, 487; and *The Marianna Flora,* 11 Wheat 1, 6 L. ed. 405. In the *Marianna Flora,* Mr. Justice Storey said at p. 38: "It is the common usage and admitted doctrine of such courts, (Admiralty) to permit the parties, upon the appeal, to introduce new allegations * * *. It has been the constant habit of the circuit courts to allow amendments of this nature in cases where public justice, and the substantial merits, required them; and this practice has not only been incidentally sanctioned in this court; but on various occasions in the exercise of its own final appellate jurisdiction, it has remanded causes to the Circuit Court, with directions to allow new counts to be filed." The 1966 rules of this court did not change the forms of pleadings in admiralty. Largely, Rule 8(e) of the Federal Rules codifies the rule of pleadings in Admiralty. There is no requirement for doing what the Court of Appeals has done here, viz;

refuse to allow this action to proceed in Admiralty upon the old pleading which is sufficient as a cargo damage claim or upon a supplemental pleading incorporating the allegations of the dismissal by the German court without reaching the merits of the cause. However, anticipating a defense ought not to be required. It was expressly stated in the *Adeline* at p. 284, "When merits clearly appear on the record, it is the settled practice, in admiralty proceedings, not to dismiss the libel, but to allow the party to assert his claim in a new allegation. This practice is consonant with equity and sound principles and has been deliberately adopted by this court on former occasions."

Even in law cases, the rule that pleadings are not required to follow forms but are simply required to allege facts upon which relief may be granted was affirmed by this court in *Conley v. Gibson*, 355 U.S. 41, and in *Foman v. Davis*, 361 U.S. 178. This court in *Foman* quoted from p. 48 of *Conley v. Gibson*, the following: "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. c/f *Maty v. Grasselli Chemical Co.*, 303 U.S. 197." Finally the admonition of Ainsworth J., in *Banco Continental v. Curtis National Bank of Miami Springs*, (5 C.A., 1969), 406 F. (2) 510 should be considered. He said at p. 514: "a motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any statement of facts which could be proved in support of his claim * * *."

The claim here has merits entitling petitioner to proceed as is its constitutional right to do. It is respectfully submitted that in the exercise of this court's own appellate jurisdiction it could grant the continuance of this action

upon the original cause of action. In any event, the decision of the Court of Appeals is plainly erroneous and it should be summarily reversed and the case remanded for trial according to the rules and practices of the Admiralty court.

The merits of petitioner's cause have not been but ought to be judicially determined, to secure the just, speedy, and inexpensive determination, which is stipulated in Rule 1 of the Federal Rules of Civil Procedure.

REASONS FOR GRANTING WRIT OF CERTIORARI

If this court does not agree that summary reversal is in order, then a fuller exposition upon an appeal ought to convince this court that the violation of the Constitutional rights of the petitioner properly invokes the jurisdiction of this court, to review the decision below. There are important questions of Admiralty practice that may have become diffused and confused with principles of civil practice, resulting, very probably, from the promulgation of the new rules for admiralty and maritime causes in 1966. This court might well take this opportunity to impress the admiralty bar that the jurisdiction of our federal courts has not been whittled away by the changes in the new Rules of practice. For example, both the district court and the Court of Appeals in this case were imbued with the idea that there was no jurisdiction in Admiralty to enforce a foreign court's judgment on a cargo damage claim. Their theory was the civil court theory that a merger of the original cause of action into the judgment occurs, leaving an ordinary action on a debt to be enforced. Logical, but not quite correct. The judgment is nonetheless on a maritime matter and a debt of a maritime nature is cognizable in Admiralty. See, *Archawski v. Hanciti*, 350

U.S. 532. Also, the underlying reason for invoking jurisdiction in Admiralty is whether the transaction is one dealing in Maritime matters. A determination of a controversy over a maritime matter is necessarily a "case of admiralty and maritime jurisdiction." c/f. *New Jersey Steam Navigation Co. v. Merchants Bank*, 47 U.S. (6 How.) 344, 420-422. Gilmore & Black, in their second edition of the Law of Admiralty, in Chapter 1 on Jurisdiction, assert the fond hope that this court will someday decree that matters maritime will all be brought within the jurisdiction of an Admiralty court as the court essential to that industry; see p. 29-31. Finding excuses for denying jurisdiction over a maritime dispute just because it has been converted into a decision or judgment would be reverting to the old strife between the common law courts and the courts of admiralty, a situation which has been eschewed these many years by our admiralty practice.

Reading the decisions of the two courts below would or should show to this court how judges sitting in admiralty might deviate from well settled doctrines of admiralty practice and start a new mixture of rules. Yet, uniformity has always been a desirable end in Admiralty. This case could be a first step in keeping deviations from forming and growing. Petitioner had cited below, *Penhallow v. Doane*, 3 U.S. (3 Dall.) 54, 1 L. ed. 507, (1795) and *Otis v. The Rio Grande*, Fed. Cas. 10, 613 (cc. La. 1872) aff'd 90 U.S. (25 Wall) 458, 23 L. ed. 158 (1875), which clearly held that decrees in admiralty of other courts could be enforced in the admiralty side of our federal courts. Also, petitioner cited *Hilton v. Guyot*, (1895), 159 U.S. 113, and *The W. Talbot Dodge*, 15 F. (2) 459 (SDNY 1956) where our admiralty court assumed jurisdiction over a decree of another admiralty court. Neither of the courts below were

impressed. They seemed to be impressed, rather, with the new, the doing away with old forms in admiralty which to them was doing away with the general maritime law if it conflicted with their notions of the more familiar civil law.

WHEREFORE, petitioner prays that this court either reverses summarily the order of the Court of Appeals or grants a writ of certiorari to review it.

Respectfully submitted,

ROBERT W. CAULDWELL
ANTHONY B. CATALDO
Attorneys for Petitioner

Appendix

APPENDIX A
DECISION AND ORDER

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
APPEALED FROM

No. 74-1544

M. W. ZACK METAL COMPANY

Appellant

v.

INTERNATIONAL NAVIGATION CORPORATION

Appellee

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Richard B. Kellam, Judge.

Argued December 5, 1974 Decided March 10, 1975

Before HAYNSWORTH, Chief Judge, BUTZNER, Circuit Judge, and THOMSEN, Senior District Judge.

Anthony B. Cataldo (Jett, Berkley, Furr and Heilig on brief) for Appellant; John W. Winston (Seawell, McCoy, Winston and Dalton on brief) for Appellee.

Upon consideration of the Petition for Rehearing, it is now ORDERED:

(1) that the opinion be modified to conform to the copy attached to this Order, and

(2) that the Petition be and it hereby is denied.

With the concurrences of Judges Haynsworth and Butzner.

s/Roszel C. Thomsen
Roszel R. Thomsen
Senior U.S. District Judge

March 10, 1975.

THOMSEN, Senior District Judge

M. W. Zack Metal Company (Zack) appeals from an order of the district court dismissing an action filed therein by Zack against International Navigation Corporation, a Liberian corporation (International). Zack had designated its action as an admiralty and maritime claim within the meaning of Rule 9(h), F. R. Civ. P., and caused the vessel Virtus, owned by International, to be attached.

International chartered its vessel Severn River to Contam Linie Hansen (the charterer), a German partnership, for a voyage in 1960 from Antwerp, Belgium, to New York. The charterer solicited cargo to be transported on board the Severn River and issued its bills of lading for such cargo signed by the vessel's master. Zack shipped with the charterer 93 coils of hot-rolled steel, for which a clean bill of lading was issued, but which were found to be damaged when they were discharged in New Sork.

In 1961 Zack instituted a suit in a court in Hamburg,

Germany, where the charterer resided, against the charterer, the individual partners of the charterer, and International. In 1966 that court found the charterer and its partners liable for the damage to Zack's steel and entered a money judgment for the full amount of the damage in favor of Zack against the charterer and its partners. Zack's claim against International was postponed for later decision.

In 1971 the German court rendered a further decision holding, according to the agreed translation, that "personal liability of the ship's owner does not exist", but that the "claims because of cargo damages are secured through a ship's creditor's right, even if — as in the present case — the carrier is not at the same time the ship's owner". The court entered a judgment that International "is convicted to submit to execution being levied on the S. S. Severn River" of US $64,018.83, plus interest and part of Zack's expenses. The affidavits of German lawyers submitted by Zack and International respectively, as well as the agreed translation of the judgment itself, show that the judgment was essentially a judgment in rem against the Severn River. All of the parties, including Zack, appealed to a higher German court, which under the German practice may take additional testimony and review both the facts and the law.

In early 1972 Zack learned that another vessel owned by International, the Virtus, was to arrive at Norfolk. Although the appellate proceedings in Germany were and are still pending, Zack commenced the present suit against International in the Eastern District of Virginia, and caused an attachment to be issued against the Virtus. International appeared specially and moved to quash the attachment and dismiss the suit. The Virtus was released after International agreed to post security. After two hearings, the district court dismissed the suit, with a full opinion.

Zack has declared on the German judgment, which furnishes no basis for an in personam claim against the owner or for the attachment of the Virtus.

The judgment of the trial court in Hamburg is under review on appeal. It may be that the appellate court will impose some other liability upon the owner, but it is plain that the trial court limited the owner's liability to its interest in the Severn River. Essentially and substantively, it is an in rem judgment against the Severn River, imposing no in personam liability upon its owner, and furnishing no basis for the assertion of an in personam liability of the owner or the attachment of any other vessel owned by International. The attachment, of course, may not be based upon the speculative possibility that the reviewing court in Germany may give Zack greater rights against the owner than the trial court did.

The German judgment did not justify the suit in the Eastern District of Virginia or the attachment of the Virtus. The decision of the district judge dismissing that suit will be affirmed.

We have treated the cause of action as being founded solely on the German judgent. Nothing we have done or said should be construed as intimating any opinion upon any cause of action Zack may have against any person, firm or corporation, including International, under the Carriage of Goods by Sea Act, 46 U.S.C. 1300 et seq.

Affirmed.

APPENDIX B
DECISION AND ORDER OF UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED JANUARY 16, 1975

(SAME TITLE)

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Richard B. Kellam, Rudge.

Argued December 5, 1974 Decided January 16, 1975

Before HAYNSWORTH, Chief Judge, BUTZNER, Circuit Judge, and THOMSEN, Senior District Judge.

Anthony B. Cataldo (Jett, Berkley, Furr and Heilig on brief) for Appellant; John W. Winston (Seawell, McCoy, Winston and Dalton on brief) for Appellee.

THOMSEN, Senior District Judge

M. W. Zack Metal Company (Zack) appeals from an order of the district court dismissing an action filed therein by Zack against International Navigation Corporation, a Liberian corporation (International). Zack had designated its action as an admiralty and maritime claim within the meaning of Rule 9(h), F. R. Civ. P., and caused the vessel Virtus, owned by International, to be attached.

International chartered its vessel Severn River to Contam Linie Hansen (the charterer), a German partnership, for a

voyage in 1960 from Antwerp, Belgium, to New York. The charterer solicited cargo to be transported on board the Severn River and issued its bills of lading for such cargo signed by the vessel's master. Zack shipped with the charteter 93 coils of hot-rolled steel, for which a clean bill of lading was issued, but which were found to be damaged when they were discharged in New York.

In 1961 Zack instituted a suit in a court in Hamburg, Germany, where the charterer resided, against the charterer, the individual partners of the charterer, and International. In 1966 that court found the charterer and its partners liable for the damage to Zack's steel and entered a money judgment for the full amount of the damage in favor of Zack against the charterer and its partners. Zack's claim against International was postponed for later decision.

In 1971 the German court rendered a further decision holding, according to the agreed translation, that "personal liability of the ship's owner does not exist", but that the "claims because of cargo damages are secured through a ship's creditor's right, even if — as in the present case — the carrier is not at the same time the ship's owner". The court entered a judgment that International "is convicted to submit to execution being levied on the S.S. Severn River" of US$64,018.83, plus interest and part of Zack's expenses. The affidavits of German lawyers submitted by Zack and International respectively, as well as the agreed translation of the judgment itself, show that the judgment was essentially a judgment in rem against the Severn River. All of the parties, including Zack, appealed to a higher German court, which under the German practice may take additional testimony and review both the facts and the law.

In early 1972 Zack learned that another vessel owned by

International, the Virtus, was to arrive at Norfolk. Although the appellate proceedings in Germany were and are still pending, Zack commenced the present suit against International in the Eastern District of Virginia, and caused an attachment to be issued against the Virtus. International appeared specially and moved to quash the attachment and dismiss the suit. The Virtus was released after International agreed to post security. After two hearings, the district court dismissed the suit, with a full opinion.

Zack has declared on the German judgment (indeed, it could not have declared on the original maritime claim for damaged cargo because of COGSA's statute of limitations.[1] There is thus a substantial question whether the initial maritime claim has been merged in the German judgment and the present action is a civil action on a debt, without the jurisdiction of Admiralty.[2] We need not decide the jurisdictional question, however, for even if there were jurisdiction in Admiralty, the German judgment) which furnishes no basis for an in personam claim against the owner or for the attachment of the Virtus.

The judgment of the trial court in Hamburg is under review on appeal. It may be that the appellate court will impose some other liability upon the owner, but it is plain that the trial court limited the owner's liability to its interest in the Severn River. Essentially and substantively, it is an in rem judgment against the Severn River, imposing no in personam liability upon its owner. (Since Zack may

1. 46 USC §1303(6) (1970).

2. Cf. Restatement Judgments §47: Restatement, Second, Judgments Tentative Draft No. 1 March 28, 1973, §47. The restatement rule is based upon cases influenced by the full faith and credit clause of the Constitution, not applicable here.

not now declare upon the original maritime claim and the only cause of action it may presently assert is subject to the substantive limitations of the unreviewed judgment of the German trial court, there is), and furnishing no basis for the assertion of an in personam liability of the owner or the attachment of any other vessel owned by International. The attachment, of course, may not be based upon the speculative possibility that the reviewing court in Germany may give Zack greater rights against the owner than the trial court did.

The German judgment did not justify the suit in the Eastern District of Virginia or the attachment of the Virtus. The decision of the district judge dismissing that suit will be *Affirmed.*

APPENDIX C
DECISION OF DISTRICT COURT
OPINION AND ORDER OF MARCH 4, 1974

On April 14, 1972, M. W. Zack Metal Company Zack) filed in this Court a complaint against International Navigation Corporation (International) asserting a claim for $150,000.00 for cargo damage, declaring it was "A case of admiralty and maritime jurisdiction" and within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure. It asserts that defendant was the owner of the Steamship SEVERN RIVER and employed the master and crew; that in January 1960, there was shipped from Antwerp, Belgium, on board the SS SEVERN RIVER, a cargo of hot rolled steel, loaded aboard in good order and for which the master issued a bill of lading; that when the steel was discharged at New York it was damaged; and that plaintiff, the owner of the cargo and bill of lading, was damaged as aforesaid. Further, plaintiff alleges that in 1961 it filed an action "against the defendant, its vessel and the charterer of said vessel in the District Court of Hamburg, Germany;" that after lengthy litigation, several judgments were rendered in plaintiff's favor, the last judgment being rendered December 7, 1971, which with interest approximates $150,000.00, which has not been paid. Plaintiff prays judgment against defendant and requests process of attachment against defendant's vessel, the steamship VIRTUS, which is or will be in this jurisdiction. The SS VIRTUS was attached by the Marshal on April 17, 1972, and copy of the summons was served on the captain. The Marshal appointed Tidewater Port Service as custodian.

Defendant appeared specially and moved to dismiss the attachment and the action, and to quash service of process.

At a hearing on the motion, it was agreed there was pending in the courts of Germany a civil action against the vessel SEVERN RIVER, its time-charterer and defendant, owner of the SEVERN RIVER; that plaintiff had obtained a judgment against SEVERN RIVER and its time-charterer, and that judgment had been rendered for owner, defendant.

In order to have the vessel released, defendant agreed to post a bond for $150,000.00, with surety, to stand in the stead of the VIRTUS, to answer the judgment of this Court or any appellate court rendered in this suit against the named defendant.

Defendant asserts the judgment of the German Court is not against this defendant; that admiralty does not have jurisdiction of this cause of action; that the judgment of the German Court limits recovery from this defendant to the ship SEVERN RIVER; that the judgment of the German Court is not to be amended, changed or modified; that the German judgment is res judicata and plaintiff is estopped from maintaining this action; plaintiff's claim is barred by the statute of limitations; and this Court ought not to accept jurisdiction because the judgment of the German Court is on appeal.

Counsel argued the matter orally and filed briefs. With argument and briefs they have filed a copy of the German judgment and some of the pleadings from the German Court. Although there is dispute as to many of the facts, and the effect of the German Court judgment, the following facts seem to be substantiated by the record as agreed upon.

1. Zack instituted suit in the proper court of Hamburg, Germany, against the Ship SEVERN RIVER, its charterers, and its owner.

2. The German Court had jurisdiction of the parties and the subject matter.

3. The German Court denied Zack the right to recover a personal judgment against International Navigation Corporation, but it awarded a judgment against the charterers and the right to enforce said judgment against the SEVERN RIVER.

4. The basis of the cause of action filed in Germany was damage to a cargo of steel which the charterers of SEVERN RIVER agreed to transport from Belgium to New York; that Zack became the owner of the bill of lading and cargo; that the damage was instituted by Zack in the German Court in 1961.

5. That the German judgment provided that International should suffer the distraint of the SS SEVERN RIVER for the claim of $64,018.83, plus 5% interest from February 10, 1960, resulting from the judgment of June 15, 1971, and that the further claims of Zack against International were dismissed.

6. That all findings by the German Court are on appeal.

7. That Zack was entitled to seek enforcement of its judgment against the SEVERN RIVER if it first deposited security in the amount of 180,000 German Marks.

8. That Zack has not deposited the security called for in 7 above. If and when deposited, the pending appeal in the German Court would not prevent attempts to enforce collection against the SEVERN RIVER.

9. That the SEVERN RIVER sunk prior to June

15, 1971, the date of the judgment mentioned in 5 above.

In argument, plaintiff asserts that at the time of entry of the judgment in June 1971, the SEVERN RIVER previously sunk and that such constitutes a fraud on the Court. But, as will be hereafter shown, there is no allegation of fraud, nor is it asserted the Court was not aware of that fact.

Further, Zack says that is is not bound by the German judgment; that since the original cause of action was one in admiralty, that when action is brought to enforce a judgment obtained in that action, the cause of action is not changed, but remains one in admiralty; that Zack is not bound by the judgment, but may institute suit on the original claim; and that it may have this Court correct any errors in the German proceedings.

It is readily apparent that several interesting issues have been raised and presented to the Court for determination.

II

(a)

Does a court of admiralty have jurisdiction of an action instituted to enforce a judgment obtained in another court, and soevereign, on an admiralty claim? That is, is the original cause of action merged into the judgment, or is the action to enforce the judgment based on the original cause of action?

Here the original cause of action arose in early 1960. Zack sought to enforce its claim for damages in a German court and voluntarily submitted its cause of action to that court. It sought and obtained a judgment with which it is not now content.

If plaintiff's action is upon the original cause of action, namely, damage to cargo, the cause of action arose in 1960, and applying the statute of limitations provided in 46 U.S.C. Section 1303(6), it would be barred in one year following date of delivery.

(b)

But, it seems apparent the action here instituted is an action to enforce the German judgment, and the admiralty or maritime cause of action merged into the judgment. It is simply an obligation to pay money or respond in the nature of a debt upon a specialty. The debt and the right of recovery is limited to the terms of the judgment, as is hereafter shown. In any event, the admiralty cause of action was merged in the judgment, and it seems a court of admiralty is not the proper jurisdiction within which to enforce the judgment. In an action on a debt, process may not be served by attaching the ship as was done here. Since there has been no proper service of process upon defendant and the judgment is not a personal debt of International, it may not be enforced against the VIRTUS. Without proper service of process to give jurisdiction, the action may not be transferred to the civil side of the Court.

Admiralty jurisdiction is limited. *In Grant Smith-Porter Co. v. Rohde*, 257 U.S. 469, 476 (1922), the jurisdiction of admiralty was thusly described:

> The general doctrine that in contract matters admiralty jurisdiction depends upon the nature of the transaction and in tort matters upon the locality, has been so frequently asserted by this Court that it must now be treated as settled. (Citations omitted)

See also *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 253-254 (1972), and *Onley v. South Carolina Electric*, ——F.2d—— (4th Cir. decided December 7, 1943).

A cause of action on a judgment is different from that upon which the judgment was entered. A judgment is an obligation to pay money in the nature of a debt upon a specialty, or a demand for the delivery of property or to perform some act. An action upon the judgment is upon a different cause of action from that merged into the judgment. It is a security of record showing a debt due from one person to another. Hence, upon recovery of a judgment, the original cause of action merges in the judgment.

Zack instituted action in a court having jurisdiction of the parties and the subject matter and having obtained judgment, its cause of action for cargo damage was merged into the judgment. *Titus v. Wallick*, 306 U.S. 282, 291 (1939); *Milwaukee County v. White Company*, 296 U.S. 268, 275 (1935); *Provident Savings Society v. Ford*, 114 U.S. 635, 641 (1885); *Gaines v. Miller*, 111 U.S. 395, 399 (1884); *Schuler v. Israel*, 120 U.S. 506, 509 (1887); *United States v. Leffler*, 11 Pet. 86, 9 L.Ed. 642; *Biddle v. Wilkins*, 1 Pet. 686, 7 L.Ed. 315.[1]

III

Is Zack prohibited from maintaining this action by the doctrine of res judicata or estoppel by judgment?[2]

1. For language from the cited cases see Appendix A.

2. Defendant readily admits that action may be maintained for enforcement of a judgment obtained in another court, but an action on the original cause of action is foreclosed. And in any action to enforce a foreign judgment, enforcement must be in accordance with the judgment.

The issue of res judicata or estoppel by judgment may be raised in a motion to dismiss. *Thomas v. Consolidation Coal Co.*, 380 F.2d 69, 75 (4th Cir. 1967), and cases there cited. See also *Southard v. Southard*, 305 F.2d 730 (2d Cir. 1962); *The Connelly Foundation v. School District, etc.*, 326 F. Supp. 241 (E.D. Pa. 1971); *348 Bloomfield Ave. Corp. v. Montclair Mfg. Co.*, 90 F.Supp. 1020 (D.C. N.J. 1950); *Cruz-Sanchet v. Robinson*, 136 F. Supp. 52 (S.D. Cal. 1956), aff'd. 249 F.2d 771 (9th Cir. 1957). Likewise these issues may be raised on motion for summary judgment. *Smith v. United States*, 369 F.2d 49 (8th Cir. 1957), cert. denied 386 U.S. 1010; *Hadden v. United States*, 105 F. Supp. 1010, Ct. Cl. 1952; *United States v. State of Alaxka*, 197 F.Supp. 834 (D.C. Alaska 1961); *Hodges v. Trail Creek Irr. Co.*, 154 F.Supp. 837 (D.C. Idaho 1957); *Daley v. Sears, Roebuck & Co.*, 90 F. Supp. 562 (N.D. Ohio 1950); *Sopp v. Gehriein*, 236 F. Supp. 823 (W.D. Pa. 1964).

And, the issues may be raised by answer, *Williams v. Murdock*, 330 F.2d 745 (3d Cir. 1964).

(a)

Res judicata is a doctrine of judicial origin, and applies to repetitious suits involving the same cause of action. It grew out of a consideration of economy of judicial time and public policy favoring the establishment of certainty in legal matters. The generally accepted rule is that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are forever bound not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. A

judgment in such a cause puts an end to the cause of action, and it may not again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948); *Tait v. Western Md. Ry. Co.*, 289 U.S. 620, 623 (1933); *Partmar Corp. v. Paramount Corp.*, 347 U.S. 89, 91 (1954); *Thomas v. Consolidation Coal Co.*, 380 F.2d 69, 77 (4th Cir. 1967); *Bartsch v. Washington Metropolitan Area Transit*, 357 F.2d 923, 924 (4th Cir. 1966); *Pan American Match, Inc. v. Sears*, 454 F.2d 871, 875 (1st Cir. 1972); *Wasoff v. American Automobile Insurance Co.*, 451 F.2d 767, 769 (5th Cir. 1971). "Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel. In this sense, *res judicata* is usually and more accurately referred to as estoppel by judgment, or collateral estoppel." *Commissioner v. Sunnen, supra* [333 U.S. 598]. Where the judgment or decree is upon the same cause of action "it is an absolute bar to the subsequent action or suit between the same parties or those in privity with them, not only in respect of every matter which was actually offered and received to sustain the demand, but also as to every ground of recovery which might have been presented." *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 319 (1927). In the last cited case, the Court pointed out that the tendency of its decisions was to require "a plaintiff to try his whole cause of action and his whole case at one time;" that he "cannot even split up his claim" and he "cannot divide the grounds of recovery." Id. 274 U.S. 320. The last referred to principle was restated in *Mine Workers v. Gibbs*, 383 U.S. 715, 723 (1966).

A fact, question or right adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by

an erroneous application of the law. *Partmar Corp. v. Paramount Corp., supra* [347 U.S. 103]; *Emich Motor Corp. v. General Motors Corp.*, 340 U.S. 558, 569; *United States v. Moser*, 266 U.S. 236, 242; *Angel v. Bullington*, 330 U.S. 183, 187 (1947); *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 325; *Thomas v. Consolidation Coal Co., supra* [380 F.2d 77].

In *Angel v. Bullington, supra*, at page 190, the Court said a party may not "begin all over again in an action involving the same issues before another forum." In that case it was suggested that the trial court did not adjudicate the merits of the controversy. Dealing with this, the Court said that it was "a misconception of *res judicata* to assume that the doctrine does not come into operation if a court has not passed on the 'merits' in the sense of the ultimate substantive issues of a litigation. An adjudication declining to reach such ultimate substantive issues may bar a second attempt to each them in another court . . . " 330 U.S. 190. In the *Angel* case, it was asserted a federal right was involved and the state court was without authority to adjudicate such a right. There the court said at page 187:

> That the adjudication of federal questions by the North Carolina Supreme Court may have been erroneous is immaterial for purposes of *res judicata*. [330 U.S. 187].

(b)

Where a claim arises in a subsequent action between the same parties upon the same claim or demand, a judgment on the merits is an absolute bar to the subsequent action. If the suit is upon a different claim or demand, then the

inquiry turns to whether the point or question to be determined in the second action is the same as that litigated and determined in the original action. *Tait v. Western Md. Ry. Co., Supra* [289 U.S. 623].

If the second action between the same parties is upon a different cause or demand, the principle of res judicata is applied more narrowly. "In this situation, the judgment in the prior action operates as an estoppel" as to all matters litigated. *Commissioner v. Sunnen, supra* [333 U.S. 598].

Simply by declaring that the second proceeding is on a different "cause of action" the litigant may not escape the binding effect of res judicata or estoppel by judgment. This was put at rest by the decision of *Baltimore S.S. Co. v. Phillips, supra* [274 U.S. 321], and reaffirmed numerous times thereafter, particularly made clear in *Hurn v. Oursler,* 289 U.S. 238, and in *Mine Workers v. Gibbs, supra,* at 383 U.S. 723, where it quoted the following from the *Hurn* opinion:

> "Upon principle, it is perfectly plain that the respondent [a seaman suing for an injury sustained while working aboard ship] suffered but one actionable wrong and was entitled to but one recovery, whether his injury was due to one of the other of several distinct acts of alleged negligence or to a combination of some or all of them. In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex.
>
> "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. 'The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear.'"

A party "seeking to enforce a claim, legal or equitable, must present to the Court, either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor." *Baltimore S.S. Co. v. Phillips, supra,* at 320. He may not prosecute his claim piecemeal, or present only a portion of the grounds in the first action and reserve the others for a second suit if he fail in the first one.

"A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause." *Baltimore S.S. Co. v. Phillips, supra* [274 U.S. 316, 325]. See also *Angel v. Bullington, supra.*

Plaintiff was free to pursue his remedy in the German courts or in the courts of this Country. He elected to proceed in the German courts. He made the choice, and is now bound by that choice.

The Court pointed out in *Magnolia Petroleum Co. v. Hunt,* 320 U.S. 430, 443-444 (1943), that plaintiff's injury or damages did not give rise to two causes of action merely because recovery in Germany "is under a different statute, or because each affords a different measure of recovery."

The grounds of recovery are the same—the damage to the goods. Plaintiff "was free to pursue his remedy in either state (country) but, having chosen to seek it in Texas (Germany), where the award was res judicata . . . (the law) precludes him from again seeking a remedy in Louisiana (United States) upon the same grounds." *Magnolia Petroleum Co. v. Hunt, supra. Magnolia* further pointed out that merely because one state authorizes compensation not permitted in the other, "and in a different measure" does not authorize the maintenance of the second action.

The mere fact that the decision is *Magnolia,* and others, was grounded in the "full faith and credit" clause of the Constitution is of no moment. The Court pointed out in *Heiser v. Woodruff,* 327 U.S. 726, 733 (1946) that "Before Erie R. Co. v. Tompkins it was recognized by this court that, apart from the full faith and credit clause, a judgment duly rendered in one court will be recognized as res judicata in a suit between the same parties in a federal court." (Citations omitted). Further, in *Heiser,* at page 733, the Court said:

> But we are aware of no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata,* which is founded upon the generally recognized public policy that there must be some end to litigation and that when one appears in court to present his case, is fully heard, and the contested issue is decided against him, he may not later renew the litigation in another court. *Baldwin v. Traveling Men's Assn.,* 283 U.S. 522, 525-6.

In *Ashe v. Swenson,* 397 U.S. 436, 443 (1970), the Court said:

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

It does not matter that one cause of action was an *in personam* and the other was an *in rem* action. *Continental Grain Co. v. Barge FBL-585,* 364 U.S. 19 (1960); *Simon v. The M/V HIALEAH,* 431 F.2d 867, 868 (5th Cir. 1970), and cases there cited.

IV

It is clear Zack submitted its cause of action to the German Court for determination. That Court exercised jurisdiction. It rendered judgment, which is now on appeal.

Having selected that jurisdiction and that Court having taken jurisdiction of the parties and the subject matter, Zack may not now institute an action in this Court on the same cause of action. Even if Zack was not prevented from so doing by the doctrine of res judicata or estoppel by judgment, it would be prevented under the doctrine that when one court accepts jurisdiction, the plaintiff may not, while that action is pending, compel the defendant to defend itself in another court on the same cause of action.

While much of the law on the subject deals with actions pending in courts of the various states of the United States, and where an attempt is made to prosecute the same cause of action in the federal courts or courts of another state, on reasoning when a plaintiff has submitted its cause of action to the courts of one sovereign and then seeks to prosecute the same action in the courts of another sovereign, plaintiff should be estopped from so doing.

This principle was dealt with in the early case of *In Re Chetwood*, 165 U.S. 443, at 459 (1897). The Court there had for consideration an action instituted by stockholders of a defunct bank against directors and officers, after the appointed receiver had refused to institute the action. Later the successor of the receiver sought to institute the same cause of action in another court. The Court said:

> The suit was properly brought in the state court, proceeded to judgment and was carried to the Supreme Court of California on appeal. These courts undeniably had jurisdiction over the suit and the parties.
>
> * * *
>
> The doctrine is firmly established that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. . . .

Again, *In Re Johnson*, 167 U.S. 120 (1897), at page 125, the Court stated:

> Ever since the case of Ableman v. Booth, 21 How. 506, it has been the settled doctrine of this court that a court having possession of a person or property cannot be deprived of the right to deal with such person or property until its jurisdiction is exhausted, and that no other court has the right to interfere with such custody or possession. (Citations omitted)

It may be stated that as a general rule the court which first acquires jurisdiction should be permitted to proceed without hindrance or interference from another court. The court "whose jurisdiction first attached, retains jurisdiction over this matter to the exclusion of all other courts

. . . until its duty has been fully performed." *Wilson v. Schnettler*, 365 U.S. 381, 385 (1961). *Wilson* cited *Harkrader v. Walder*, 172 U.S. 148 (1898), where at 164 it said:

> When a state court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal cases. (Citations omitted)

Wilson also cited *Peck v. Jenness*, 7 How. 612, 624-5, 17 Dec. of Supreme Court, Curtis 320-327, and set out in the footnote numbered 4 on page 384, the language of that opinion, i.e.—

> "It is a doctrine of law too long established to require a citation of authorities, that . . . where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other." *Peck v. Jenness, supra*, at 624-615.

The principle that the tribunal which first gets jurisdiction of the matter holds it to the exclusion of the other, applying in both civil and criminal cases, was set out in *Lynch v. Snepp*, 472 F.2d 869, 772 (4th Cir. 1973).

In *Ryan v. Seaboard and Roanoke Railroad Company, et al.* 89 Fed. Rep. 397 (Circuit Court, E.D. Va. 1898),

defendant sought to have the action dismissed because there was a suit pending between the same parties on the same subject matter in a federal court in Maryland. At page 408, the Court said:

> When a court has assumed jurisdiction of a subject, all other courts should refrain from interference. In no other way can be prevented unseemly conflict between courts.

Hence, it is clear that this Court ought not to accept jurisdiction of a cause of action pending in another court. A defendant ought not be required to defend a single cause of action in two jurisdictions.

The mere fact this Court may have jurisdiction does not require it to exercise it. *United Mine Workers v. Gibbs,* 383 U.S. 715, 725 (1966); *Ratliff v. Cooper Laboratories, Inc.*, 444 F.2d 745 (4th Cir. 1971); *Webb v. Bladen, et al.* ——F.2d—— (4th Cir. 1973).

V

Is a judgment of a court of admiralty of Germany, which has jurisdiction of the parties and of the subject matter, when sought to be enforced in the courts of the United States, conclusive, or only prima facie evidence of what it purports to be?

It seems to be established by the great weight of authority in this Country that a foreign judgment of a court of admiralty having jurisdiction of the parties and the subject matter is entitled to conclusive effect and binding on all parties, sometimes described as conclusive against all the world. *Ritchie v. McMullen,* 159 U.S. 235 (1895); *Hilton v. Guyot,* 159 U.S. 113 (1895); *Flota Maritima*

Browning v. Motor Vessel Cuidad, 218 F. Supp. 928, 942 (D.C. Md. 1963), aff'd. on another issue, 335 F.2d 619 (4th Cir.); *The Chiquita, Hartwig v. United States,* 19 F.2d 417 (5th Cir. 1927); *Williams v. Armroyd,* 2 Dec. of Supreme Court 603, 7 Cranch 423, 3 L.Ed. 329; *Petition of Bloomfield Steamship Co.*, 298 F. Supp. 1239, 1241 (D.C. N.Y. 1969), aff'd. 442 F.2d 728, 733 (2d Cir. 1970); *The East F. cas.* 4251 (D.C. N.Y.); *The Kaiser Wilhelm Der Grosse,* 175 F. 215 (D.C. N.Y.); *The W. Talbot Dodge,* 15 F.2d 459 (D.C. N.Y. 1926); *Applewhaite v. The SS SUN-PRINCESS,* 150 F. Supp. 827 (D.C. N.Y. 1956)0 *The Sark,* 245 F. 909 (D.C. La. 1912; *Zimern Coal Co. v. Coal Trading Association,* 30 F.2d 933 (5th Cir. 1929); *Harrison v. Triplex Gold Mines,* 33 F.2d 667, 671 (1st Cir. 1929); *Mpiliris v. Hellenic Lines, Ltd.*, 323 F. Supp. 865, 872 (S.D. Texas 1969), aff'd. per curiam 440 F.2d 1163 (5th Cir. 1971); Vol. 47 Am. Jur. page 239, Subject Judgment, Section 1238; 50 C.J.S., Subject Judgments, page 545, Section 906(d).

In those jurisdictions where judgments of foreign nations, in other than admiralty actions, are only prima facie evidence of what they purport to be, and are subject to attack on certain grounds, the grounds of attack are limited to fraud and lack of jurisdiction. Not only are neither of these grounds alleged here, but no grounds are alleged which would require the Court to give other than conclusive effect to the German judgment.

But, to "warrant the impeachment of a foreign judgment because procured by fraud, fraud must be distinctly alleged and charged (citation omitted)? *Ritchie v. McMullen,* 159 U.S. 235, 242 (1895); *Chamberlain Machine Works v. United States,* 270 U.S. 347, 349 (1926). See *Toledo Scales Co.*, 261 U.S. 399, 421; *Hilton v. Guyot,* 159 U.S. 113, 207 (1895); *Fogg v. Blair,* 139 U.S. 118, 127; *Wollensar v.*

Reihen, 115 U.S. 96; Vol. 46 Am. Jur. 2d, Subject Judgments, page 1018, Section 876; *Martin v. Williams*, 194 Va. 437, 73 S.E.2d 355, 359 (1952).

Again, there is no allegation or evidence of fraud in this case. After reviewing the cases, the Court in *Harrison v. Triplex Gold Mines*, 33 F.2d 667, 671 (1st Cir. 1922), set forth the fraud necessary to be shown in an attack upon a foreign judgment, namely:

> In any case to justify setting aside a decree for fraud, it must appear that the fraud practised, unmixed with any fault or negligence of the party complaining, prevented him from making a full and fair defense, and that the fraud complained of was not involved in, or presented to, the court of first instance either at the original trial or in a petition for review. This rule is universal. False testimony or fabricated documents are not sufficient to justify the interference of a court of equity, if they have been presented to the court determining the law and the fact in the first instance. The reason for the rule is that there must be an end to litigation.

In the case of Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 421, 43 S.Ct. 458 (67 L.Ed. 719) Chief Justice Taft Says:

"We do not find ourselves obliged to enter upon a consideration of the sometimes nice distinctions made between intrinsic and extrinsic frauds in the application of the rule, because in any case to justify setting aside a decree for fraud whether extrinsic or intrinsic, it must appear that the fraud charged really prevented the party complaining from making a full and fair defense."

The facts in *Ritchie v. McMullen, supra* [159 U.S. 235] are quite similar to those here, except that case did not deal with admiralty. There action was instituted in the United States Court for Ohio to enforce a judgment recovered by McMullen against Ritchie in Canada. Ritchie had appeared in the Canadian Court and defended the action. In the Ohio Court Ritchie sought to set up defenses to the contract which was the basis of the judgment in Canada. He also sought to establish that the judgment was entered without a hearing and without his knowledge, that the judgment was irregular and void, without jurisdiction or authority. The Supreme Court pointed out that by the law of England prevailing in Canada, "a judgment rendered by an American Court under like circumstances would be allowed full and conclusive effect." 159 U.S. 242. After pointing out that Ritchie could not set up the same defenses made to the Canadian action and try anew the merits of the original claim, the Court said:—

> Upon principle, therefore, as well as upon authority, comity requires that the judgment sued on should be held conclusive of the matter adjudged.

Hilton v. Guyot, 159 U.S. 113 (1895), decided the same day as the *Ritchie* case, supra, was a 5 to 4 decision, while Ritchie was a unanimous decision. In the *Hilton case*, Guyot brought action on a judgment obtained in France against Hilton. Hilton raised numerous defenses such as lack of jurisdiction, lack of service of process, etc. The issue finally determined by the majority opinion was that inasmuch as France did not give conclusive effect to the judgments of other nations, in actions on French judgments in the courts of the United States, we would only hold the judgment was prima facie evidence of what it purported to be. The Court expressed it this way:

> . . . there is a distinct and independent ground upon which we are satisfied that the comity of our nation does not requrie us to give conclusive effect to the judgments of the courts of France; and that ground is, the want of reciprocity, on the part of France, as to the effect to be given to the judgmentsof this and other foreign countries. [159 U.S. 210].

And, continuing, again at page 228, the Court concluded:

> In holding such a judgment, for want of reciprocity, not to be conclusive evidence of the merits of the claim, we do not proceed upon any theory of retaliation upon one person by reason of injustice done to another; but upon the broad ground that international law is founded upon mutuality and reciprocity . . . [159 U.S. 228].

Too, the Court held that in most countries "the fraud alleged in its procurement would be sufficient ground for disregarding it." Id. p. 228.

Mr. Chief Justice Fuller, joined by three other Justices, dissented. The dissent pointed out that the fraud alleged had been considered by the French Court, and that this Court should not therefore permit it to again be reexamined upon the merits. The dissent said at page 229:

> This question I regard as one to be determined by the ordinary and settled rule in respect of allowing a party, who has had an opportunity to prove his case in a competent court, to retry it on the merits, and it seems to me that the doctrine of *res judicata* applicable to domestic judgments should be applied to foreign judgments as well, and rests on the same general ground of public policy that there should be an end of litigation.

> This application of the doctrine is in accordance with our own jurisprudence, and it is not necessary that we should hold it to be required by some rule of international law. The fundamental principle concerning judgments is that disputes are finally determined by them, and I am unable to perceive why a judgment *in personam* which is not open to question on the ground of want of jurisdiction, either intrinsically or over the parties, or of fraud, or on any other recognized ground of impeachment, should not be held *inter partes*, though recovered abroad, conclusive on the merits.

And on page 231:

> Obviously the last persons who should be heard to complaint are those who identified themselves with the business of that country, knowing that all their transactions there would be subject to the local laws and modes of doing business. The French courts appear to have acted "judicially, honestly, and with the intention to arrive at the right conclusion;" and a result thus reached ought not to be disturbed.

The following view of the rule in England was expressed by Lord Herschell in *Nouvion v. Freeman*, L. R. 15 App. Cas. 1, 9, quoted in the principal opinion: "The principle upon which I think our enforcement of foreign judgments must proceed is this: that in a court of competent jurisdiction, where according to its established procedure the whole merits of the case were open, at all events, to the parties, however much they may have failed to take advantage of them, or may have waived any of their rights, a final adjudication has been given that a debt or obligation exists

> which cannot thereafter in that court be disputed, and can only be questioned in an appeal to a higher tribunal. In such a case it may well be said that giving credit to the courts of another country we are prepared to take the fact that such adjudication has been made as establishing the existence of the debt or obligation."

The *Hilton* opinion is some 60 pages long. In it Mr. Justice Gray dealt with numerous decisions from other countries, in fact, with decisions from most of the civilized nations of Europe. It is clear from the opinion that most of those nations held the judgments of other nations when used as a basis for an action in their countries,[3] as conclusive.

VI

In summary—

1. The admiralty claim merged into the judgment and an admiralty court does not have jurisdiction. Since there is no jurisdiction, and no proper service of process, the action may not be transferred to the civil side of the Court.

2. Plaintiff submitted its claim to the German Court which had jurisdiction of the parties and the subject matter, which rendered a decision denying a personal judgment against International, but limited recovery, insofar as International was concerned, to the SEVERN RIVER. It granted judgment against the character. That action is on appeal. Plaintiff was granted the right to seek enforcement of its judgment pending the appeal, upon its posting bond set forth in the judgment order of the German

3. The exact language is set out in Appendix B.

Court. It has not posted the bond.

3. Plaintiff here seeks to maintain this suit on the same claim presented to the German Court. It and International were parties to that suit. The cause of action is the same. The doctrine of res judicata stands as a barricade to this action. Plaintiff is estopped by the judgment of the German Court from relitigating its cargo damage claim, and is bound by the terms of the German judgment. It cannot here assert the German Court misinterpreted its law or exceeded its power. Appeal provided by the German procedure is the jurisdiction to correct any such errors.

It must be understood that plaintiff has a right to enforce its German judgment by bringing suit on it in the Courts of the United States, but not to relitigate the issues determined by the German Courts, nor to amend, modify or change the judgment. If it is based upon an erroneous view of the law, it is not open to collateral attack, but must be corrected by direct review and not by bringing another action upon the same cause.

4. The admiralty judgment of the German Court is binding and conclusive, when sued on in the Courts of this Country, except for fraud, lack of jurisdiction, or other matters not present in this case. It is admitted the German Court had jurisdiction of the parties and the subject matter. Plaintiff selected that forum. No fraud is alleged. If International in fact practiced fraud upon the German Court by improper evidence or misrepresentations, then the place to allege and correct it is in the German Court, and not by attempting to relitigate the cause of action or by a collateral action in this Court.

5. The German Court first acquired jurisdiction of the cause of action submitted to it by plaintiff. It still has jurisdiction. Plaintiff may not seek to circumvent the

rulings of that Court by instituting a suit on the same cause of action in this Court, or by collaterally attacking the judgment of the German Court.

For the reasons above stated, the plaintiff may not maintain this suit, and it is accordingly DISMISSED.

s/Richard B.
United States District Judge

Norfolk, Virginia
March 4th, 1974

APPENDIX E
COMPLAINT

(SAME TITLE)

Plaintiff files this complaint in a cause of cargo damage and seeks the sum of One hundred fifty thousand ($150,000.00) dollars from the defendant on the following grounds:

1. This is a case of admiralty and maritime jurisdiction as hereinafter more fully appears. This is an admiralty and maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure.

2. The plaintiff at all times hereinafter mentioned was and still is a corporation with its main office in Detroit, Michigan.

3. The defendant, International Navigation Corporation, Monrovia, Liberia, was and still is a corporation organized and existing under and by virtue of the laws of the Republic of Liberia.

4. At all times hereinafter mentioned the defendant was the owner and operator of the Steamship SEVERN RIVER and it employed the master and crew of said vessel.

5. In January 1960 there was shipped at Antwerp, Belgium on board the SS SEVERN RIVER a certain cargo of hot rolled steel consisting of ninety-three (93) coils, which cargo was loaded aboard said vessel in good order and condition and for which the masters of said vessel issued a bill of lading unto the order of the shipper of said goods.

6. The SS SEVERN RIVER then proceeded to the port of New York, New York and there discharged the cargo of

steel, but not in the like good order and condition as when shipped as the steel was seriously damaged.

7. At the time of the discharge of said cargo at the port of New York, the plaintiff was the owner of said cargo and the bill of lading and became entitled to delivery of said shipment.

8. The plaintiff, having complied with the terms of the contract of affreightment, thereby became seriously damaged due to the fault of the vessel and its owner, the defendant, and has suffered damages in the sum of approximately $150,000.00 as nearly as can now be estimated.

9. Thereafter in 1961, plaintiff timely filed a law suit against the defendant, its vessel and the charterer of said vessel in the District Court of Hamburg, Germany. After lengthy litigation, several judgments were rendered in plaintiff's favor, the last judgment being rendered on December 7, 1972. The judgment, together with interest and costs, approximates the sum of $150,000.00, but has never been paid by the defendant.

WHEREFORE, the plaintiff demands judgment against the defendant in the sum of One hundred fifty thousand ($150,000.00) dollars, plus interest and costs, and further requests the Court to issue process of attachment against defendant's vessel, the Steamship VIRTUS, which is or will be within the jurisdiction of this Court during the pendency of process. Since the defendant is a foreign corporation and cannot be found within the district, it is prayed that the SS VIRTUS be attached as the property of the defendant.

M. W. ZACK METAL COMPANY

By s/Carter B. S. Furr
Of Counsel

APPENDIX F

AFFIDAVIT OF ISA DROBNIG

Mrs. Isa Drobnig, LL.M. of Hamburg 11, Cremon 3, West Germany

I am a lawyer in Hamburg, West Germany, admitted to the Hamburg bar in 1959 and having practised in the law firm Hasche Albrecht Fischer since 1958, being a partner in this firm since 1962. The law firm deals principally in matters of commercial and shipping law.

Regarding the proceedings of M.W. Zack Metal Co., Detroit, versus inter alia International Navigation corporation, Monrovia, Liberia, before the Hamburg courts, I give, to the best of my knowledge, the following affidavit to be used in the United States District Court for the Eastern District of Virginia, Norfolk Division:

1. The aforementioned proceedings concern a shipment of steel coils consisting of "93 open hearth hot rolled coils prime in every respect including condition and quality in SAE 1008" shipped from Antwerp to New York in SS "Severn River" which belonged to International Navigation Corp., under B/L no. 35 dated Antwerp, 14th January 1960 and issued by Contam Linie Jansen & Co.

In the proceedings the Hamburg Regional Court (first instance) judged that the Defendant (International Navigation) submit to execution of the SS "Severn River" for an amount of US $64,018.38 plus 5% interest from February 10th, 1960.

The court further decided that this judgment be for the time being enforceable provided Plaintiffs put up security in the amount of 180,000 German marks.

Both Plaintiff and Defendant have appealed against this decision. The Appeal is now pending before the Hamburg Appellate Court.

2. Under the German Code of Civil Procedure, provided the Plaintiff puts up security in the amount ordered by the court of 1st instance, the judgment rendered by the court is enforceable in spite of the pending appeal. The legal provisions are arts. 704, 710 and 717 Zivilprozebordnung (German Code of Civil Procedure).

The security is afforded in order to guarantee a possibility for the Defendant to recover any damages suffered by enforcement of the judgment of the court of 1st instance in case the Appellate Court changes the judgment in Defendant's favour.

The fact that there is an appeal against the judgment of 1st instance currently pending does not in itself prohibit enforcement. There has been no application or order to stay the enforcement.

3. Insofar as appeal is lodged against the judgment of 1st instance a completely new hearing can be held before the Appellate Court regarding facts and laws including the taking of additional testimony by the Appellate Court (arts. 525, 529 German Code of Civil Procedure). This does not affect the possibility of enforcing the judgment of 1st instance as long as the Appellate Court itself has not come to its decision (art. 717 para 1. German Code of Civil Procedure).

If the Appellate Court should change the judgment of 1st instance and this judgment has already been enforced, the Plaintiff has to make restitution to the defendant isnofar as the judgment has been changed in favour of the Defendant. The security ordered is to guarantee the possibility of restitution.

4. The judgment against International Navigation Corp. was limited to an execution against the "Severn River". This was because the court decided that there is a maritime lien only on the vessel. Under German law the vessel is not regarded as a person but as part of the assets of its owner. The liability created by the vessel is a liability of her owner. This is why the owner was made a party to these proceedings.

If the Appellate Court applies German Law regarding International Navigation corp. (the court of 1st instance applied Liberian Maritime Law) it will have to change the judgment of 1st instance into a judgment ordering the Defendant to pay the amount due to M.W. Zack Metal Co. It is provided under German law (art. 774 Handelsgesetzbuch — German Commercial Code) that where a maritime lien has arisen and the vessel is then (i.e. later) sent out on a new voyage, the owner is personally liable for the amount covered by the maritime lien.

s/Isa Drobnig

APPENDIX G

AFFIDAVIT OF DR. HERBERT GIENOW

DR. HERBERT GIENOW, RECHTSANWALT,
HAMBURG, WEST GERMANY

I am a lawyer in Hamburg/West Germany admitted to the Hamburg bar in 1954 and having practised law, principally commercial and maritime, in my own law firm since that date.

I have read in copy the "Brief on Behalf of Plaintiff" in the civil action.

Zack Metal v. International Navigation Corp. with attached affidavit by Mrs. Drobnig.

To be used in the aforementioned proceedings before the US District Court for the Eastern District of Virginia Norfolk Division, I give to the best of my knowledge the following affidavit:

The brief summary of facts contained in Mrs. Drobnig's affidavit is correct, though restricted to very few elements of the merits. It should be amended by stating that

— the plaintiff has obtained from the cargo underwriters for the damages in question the sum of roughly 59.000 US Dollars for capital and interest where against the plaintiff agreed to split any recovery from the defendants on a 45/55 basis with said underwriter. The underwriter's share has later been assigned to the defendants.

— the judgment of the first instance is enforceable only against the vessel, i.e. by seizing the SS SEVERN RIVER, but with a view to the vessel having been scrapped plaintiff is in the second instance seeking for a judgment enforceable against the owners. The existing judgment (of the

first instance) appears to be equivalent to a judgment in rem, because notwithstanding the owners being the defendants, its execution is restricted to seizing and formally selling the vessel.

— Enforcement of the Judgment of the first instance, if the vessel were still existing, would require an "enforceable duplicate" (vollstreckbare Ausfertigung) from the court's clerk, which to the best of my knowledge has not been applied for by the plaintiff. Enforcement further requires the plaintiff to put up prior to execution the security provided in the judgment; such security, as far as I know, has not been posted.

— Plaintiff has sued for identical damages owners and charterers of the SS SEVERN RIVER. Upon his being successful in the first instance, charterers have put up a security satisfying the plaintiff. The amount of damage awarded to plaintiff by the Hamburg court of the first instance is the same and identical against owners and charterers.

— It is true that

> "The fact that there is an appeal against the judgment of 1st instance currently pending does not in itself prohibit enforcement. There has been no application or order to stay the enforcement."

Enforcement against the defendants in this case however is conditioned by the plaintiff putting up certain security, which he has not done wherefor application or order to stay the enforcement was neither necessary nor advisary.

Concerning the "Brief on behalf of plaintiff" itself I should like to state that:

— The suit in Hamburg was and is (inter alia) against International Navigation, only a person being capable to

sue and defend in a German court. The judgment rendered so far against International Navigation, however, can merely be enforced against the vessel, all other assets of International Navigation not being seizable under this judgment, whether the court applied the law properly or not.

— The judgment was but partly rendered in favour of the plaintiff who claimed and claims damages higher than awarded.

— As can be seen from the wording of the judgment it is not upon the defendant to file any bond whatsoever, but the plaintiff as a precondition of enforcement would have to post the requisite security before he would be permitted to enforce.

— Under the German judgment and law the plaintiff is not legally entitled to any security. It is Zack Metal who has to file a bond or equivalent for security before they can take any steps. Enforcement and/or security in favour of the plaintiff abroad would strongly interfere with the intention of the German judgment which in turn is based on the German Civil Procedure Code.

Without prejudice to the decision of the second instance it may be added, that during the passed hearings the judges of the appellate court made clear that they were not to support various opinions on which the judges of the first instance has based their decision in favour of the plaintiff.

s/Herbert Gienow